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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1–53) [1] is not yet reported. The decision and order of the Board are reported at 192 NLRB 173 (Pet. App., pp. 54–77, 78–106).

[1] Since the opinions below are lengthy and have already been reproduced as an appendix to the petition of *The Emporium Capwell Co.*, in No. 73–696, O.T. 1973, seeking review of the same judgment, "Pet. App." references are to the appendix to that petition.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 23) was entered on June 29, 1973. On September 19, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge employees who, during good faith efforts by the union that is the exclusive bargaining representative of the employees to eliminate alleged racially discriminatory employment practices under the grievance and arbitration procedures of the collective bargaining contract, insisted that the company bargain directly with them to eliminate those practices and, upon the company's refusal to do so, picketed the company and urged customers to boycott it.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Pet. App., 108–110.

STATEMENT

A. The Board's Findings of Fact

The Company operates a retail department store in San Francisco, California (A. 232–233).[2] Through its membership in a multi-employer group, the Retailer's Council, the Company was signatory to a collective

[2] "A." refers to the appendix to the briefs in the court below. A copy has been filed with the clerk.

bargaining agreement with the Department Store Employes Union (the "Union"), which was the exclusive bargaining representative of the employees in the stock and marking areas of its store (A. 233). The applicable bargaining agreement provided:

> Section 21(E), No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex.
>
> * * * * *
>
> Section 5(B), Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement * * * may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and permissive within this agreement. [A. 233; 131–132, 205, 201.][3]

The agreement also provided that, if after considering a submitted issue for one week the Adjustment Board were unable to reach a settlement, either party could insist upon binding arbitration (A. 233; 208). Finally, the agreement contained a clause providing that there "shall be no strike or lockout during the life of this agreement" (Section 36(A), A. 233; 208).

In a series of meetings in early April 1968,[4] a group of Company employees, including Tom Hawkins and James Joseph Hollins, submitted to union representatives a list of grievances alleging that the Company

[3] The Adjustment Board consisted of six members, three from the Company and three from the Union (Section 36(B), A. 208).

[4] All dates are in 1968 unless otherwise indicated.

was discriminating against racial minorities (A. 233; 133–134), including the charge that employee Russell Young had been denied advancement solely because he is black (A. 234; 134–135). Following these meetings, Union Secretary-Treasurer Walter Johnson designated a union committee to investigate the allegations, and later prepared a detailed report outlining the employees' contentions, which stated:

> Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination does exist and that this discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age. [A. 234; 116, 134–135, 193.] [5]

Shortly thereafter, Johnson presented his report to the Retailer's Council, which concluded that the grievances should be taken directly to the Company (A. 34–35). Accordingly, in mid-April, Johnson met with Company labor relations manager Paul Ehrenfried and it was agreed that the Company "would look into" the situation and "see what could be done" (A. 234; 135).

In May, a group of ten employees, including Hawkins and Hollins, again met with Union representative Johnson. They discussed the problem of racial discrimination in general and the Russell

[5] Copies of the report were distributed to several union members, and Hawkins and Hollins (who were not members of the Union) saw it prior to engaging in their concerted protest (A. 41–42, 117, 138).

Young case in particular (A. 234; 134–136); however, since Young was about to begin his summer vacation, it was agreed that further investigation of the matter should await his return (*id.* at 134–136).

On about September 3, Johnson again met with the employees, including Hawkins and Hollins, and with representatives of the State Fair Employment Practices Committee ("FEPC") and the local Economic Opportunity Council ("EOC") (A. 234; 112, 136). At that meeting Johnson stated that the Union had considered the problem and had concluded that the Company had been acting discriminatorily. He added that in accordance with its contract the Union would demand an Adjustment Board proceeding and would insist upon arbitration if necessary. While acknowledging that arbitration was a time-consuming procedure (A. 234; 146), Johnson pointed out that an arbitration award, once achieved, would produce a "long lasting effect" which would benefit not only the employees having an immediate interest in the problem, but "other people involved in it" as well (A. 234; 136–137, 146).

Some of the employees present expressed "frustration" with Johnson's proposal, and suggested that the Union picket the Company's store (A. 145–146). Johnson rejected the idea, and, in an exchange with Hollins, explained that the Union was obligated to seek satisfaction of grievances according to the terms of its contract and thus could not engage in "dramatic" protests such as boycotts (A. 244–245; 145–147). Johnson further stated that, while individual employees "could take whatever action they wanted so long as it was

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legal," it was the Union's advice that they follow an "orderly legal procedure" (A. 145–146). The EOC and FEPC representatives supported Johnson's position (A. 234; 137, 146, 148–149, 153–155).

The next day, Johnson wrote Vincent Brown, general manager of the Retailer's Council, requesting a meeting of the Adjustment Board to resolve the grievances discussed at the previous day's meeting. The letter stated (A. 235; 144, 166):

> We specifically charge the Emporium with violations of Sections 5(B) and 21(E), of the Agreement between the San Francisco Retailers Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.
>
> We are ready to proceed to immediate arbitration if The Emporium is ready.

In response to this letter, a meeting of the Adjustment Board was convened on October 16. At the outset, Union agent Williams attempted to present evidence of the Company's practices by questioning employees regarding their individual grievances. He was interrupted by Hollins, who—acting as spokesman for himself and employees Hawkins, Epps, and Washington—read a prepared statement objecting to the prosecution of grievances on an individual rather than a group basis and stating that the four employees would not "speak as individuals," but would act only "as a group" (A. 235; 43–44, 49, 115, 113). Hollins added that the group "wanted to talk to the President of The Emporium and wouldn't talk to anybody else" (A. 235; 62, 60), that their "main purpose was to talk to the President to try to reach an agreement with

him to straighten out the problems and conditions of The Emporium" (A. 235; 60). Then, after refusing to give any testimony regarding the individual employee complaints, Hollins, Hawkins, Epps, and Washington walked out of the meeting (A. 235; 43–44, 114).

The Adjustment Board met again on October 18, but none of the four attended. The record is unclear as to what transpired at the meeting, but thereafter, through the Union's intervention, Russell Young was promoted to the position of First Assistant Manager, and Fata, another minority employee, was also promoted to a supervisory position (A. 236; 55–56).[6]

After the October 18 meeting, Hollins went to Company President Batchelder and insisted that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store". Batchelder would not speak with Hollins, but suggested that Hollins discuss the situation with Henderson, the Company's personnel director (A. 236; 120–121). Hollins refused (A. 236; 122).

On October 22, Hawkins and Hollins, together with several other employees, called a press conference at the Sun-Reporter Building in San Francisco, which was attended by representatives of the press, radio, and television. The employees stated that the Emporium was engaging in racist conduct by discriminating against racial minorities and that the employees were

[6] Notwithstanding the results achieved for Young and Fata, the Union's attorney advised the Union that further success with arbitration was unlikely without the testimony of Hawkins, Hollins, and the other employees (A. 138).

planning to picket the store. Hollins also read the contents of a handbill which the group intended to distribute to the public (see below), adding that its objective was "[t]o try to talk to the top management to get better conditions for The Emporium" (A. 236; 17–20, 62–63, 81–82).

On the following Saturday, November 2, employees Hollins, Hawkins, Epps, and Washington picketed the store from 9:30 a.m. to 6 p.m.,[7] distributing the following handbill to people entering or leaving the store:

> BEWARE EMPORIUM SHOPPERS
> BOYCOTT IS ON ! ! !
>
> For years at the Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.
>
> The Emporium is a 20th Century Colonial Plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.
>
> Whenever the racist pig at the Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium.

[7] The picketing was peaceful, was not done during the picketing employees' working hours and did not block entrances to the store (Pet. App., pp. 86–88, 94–95).

> We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute. [A. 236–237, 198.]

While the picketing was in progress, Johnson, the Union representative, told Hollins that he did not want to see Hollins fired and that the only way to resolve the matter was through arbitration. Hollins ignored Johnson's suggestion and again stated that "the only one they wanted to talk to was Mr. Batchelder" (A. 236–237; 139).

On November 7, Hollins and Hawkins were called to labor relations manager Ehrenfried's office, and given the following written warning with respect to the prior press conference and handbilling:

> These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.
>
> There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.
>
> This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement. [A. 237; 26–27, 85–86, 197, 189.]

Nevertheless, on Saturday, November 9, Hollins and Hawkins again picketed The Emporium and distributed leaflets substantially identical to those distributed the previous week (A. 237; 26–27, 85–86, 196). Accordingly, on Monday, November 11, they were

called to Ehrenfried's office and discharged. They were given discharge slips which bore the notation:

> You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of The Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68. [A. 238; 31, 87–88, 195, 188.]

The Union subsequently filed with the Retailer's Council a protest over the discharge of Hawkins and Hollins, but did not file unfair labor practice charges with the Board (A. 238, 245; 138). Such charges were filed on their behalf by respondent Western Addition Community Organization (Pet. App., p. 11).

B. The Board's Conclusion and Order

The Board (Members Jenkins and Brown dissenting), sustaining its Trial Examiner, found that the picketing employees were making a demand that the Company "bargain with [them] for the entire group of minority employees," notwithstanding that the Union, the employees' "duly designated bargaining representative, was endeavoring in every way available to it under the [collective bargaining] agreement to adjust any and all cases of racial discrimination brought to its attention" (Pet. App., pp. 103–104).[8] The Board concluded that such concerted activity was not protected by Section 7 of the Act, for it "would seri-

[8] While the Board found that Hawkins and Hollins acted in the "good faith belief" that the Company was practicing racial discrimination (Pet. App., p. 97), it did not find that the Company was in fact engaging in racial discrimination or a pattern or practice thereof (Pet. App., p. 55, n. 2).

ously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement" (Pet. App., pp. 104–105).[9] Accordingly, the Board dismissed the complaint, which alleged that the Company violated Section 8(a)(1) of the Act by discharging Hawkins and Hollins for engaging in the picketing and related activities (Pet. App., p. 56).

C. The Court of Appeals Decision

The court of appeals agreed that, "[i]n abandoning the grievance procedures and seeking to bargain on their own, the picketers here rendered essentially ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement" (Pet. App., p. 24). It concluded however, "that this limited interference *alone* [was not] sufficient to remove

[9] The Board in arriving at its decision considered the views of the Equal Employment Opportunity Commission and the National Association for the Advancement of Colored People, which filed *amicus curiae* briefs with the Board (Pet. App., p. 54, n. 1).

these concerted activities here from the protection of the Act" (Pet. App., p. 24). The court determined that concerted activity involving racial discrimination has a unique status in that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, proscribes racially discriminatory employment practices wholly apart from any prohibition in the collective bargaining agreement, and Section 704(a) of that Title, 42 U.S.C. 2000e–3(a) (*infra*, p. 17) "precludes an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices" (Pet. App., p. 20). Accordingly, it was necessary to accommodate Section 9(a) of the National Labor Relations Act (*infra*, p. 13), which confers upon the representative selected by a majority of the employees the exclusive right to bargain for all employees in the unit, with Title VII. In the court's view, a reasonable accommodation required the Board, in cases such as this, to inquire "whether the union was actually remedying the discrimination to the *fullest extent possible by the most expedient and efficacious means*"; where "the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose its section 7 protection" (Pet. App., p. 28, emphasis in original). The court remanded the case to the Board to make that determination (Pet. App., p. 31).[10]

[10] The court also provided that, on remand, "the Board may consider the issue of whether the picketing of these employees, considering the language used, was so disloyal to their employer as to remove them from the protection of section 7."

REASONS FOR GRANTING THE WRIT

The holding of the court below—that concerted activity by a minority group which would otherwise be contrary to the principle of majority rule embodied in Section 9(a) of the National Labor Relations Act is protected where it seeks to eradicate alleged racially discriminatory employment conditions—raises an important and substantial question in the administration of the National Labor Relations Act. It also raises a fundamental question concerning the relationship between the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. Review by this Court is thus warranted.

1. Section 9(a) of the National Labor Relations Act provides that the representative selected by a majority of the employees in an appropriate unit shall be the exclusive representative of all employees in that unit for purposes of collective bargaining with respect to wages, hours of employment, or other conditions of employment. The legislative history of Section 9(a)

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under *National Labor Relations Board v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464 (Pet. App., p. 29). In view of its disposition of the case, the Board has found it unnecessary to reach that issue.

Judge Wyzanski, who dissented, would have found the concerted activities here protected by Section 7 of the National Labor Relations Act without any further inquiry by the Board. In his view, Section 9(a) of the National Labor Relations Act could not properly be construed as precluding a minority group from dealing directly with the employer on racial complaints (Pet. App., pp. 45–51). Moreover, since the Board refrained from any comment on the "utterances by Hawkins, Hollins, and their associates," the issue of their propriety was not properly before the court (Pet. App., pp. 51–52).

makes clear that Congress, in order to promote orderly collective bargaining, and thereby to preserve industrial peace, intended to vest in the employees' chosen representative full power to represent all employees, including dissident or splinter groups, and also, as a necessary corrollary, to preclude the employer from bargaining directly with such groups. See S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. 13; H. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. 20–21. See also *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180. Accordingly, this Court early recognized that "it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions." *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 684. See also *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 338–339.

The court below did not disturb the Board's finding that the concerted activities here involved "nothing short of a demand that [the Company] bargain with the picketing employees for the entire group of minority employees" (Pet. App., p. 24, n. 34). The court also stated that, "[i]n abandoning the grievance procedure and seeking to bargain on their own, the picketers here" not only interfered with the collective bargaining process, but "rendered essentially ineffective

the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement" (Pet. App., p. 24).[11] In his dissenting opinion Judge Wyzanski similarly recognized that the minority employees' actions were a clear "instance of an attempt to bargain respecting working conditions * * *" (Pet. App., p. 43).

Thus, unless different principles apply when the minority employees' actions are directed against racially discriminatory employment conditions, the dissident activities here were contrary to the policy of Section 9(a), and thus fell outside the protection of Section 7 of the Act. See *National Labor Relations Board* v. *Sunset Minerals, Inc.*, 211 F. 2d 224 (C.A. 9); *Plasti-Line, Inc.* v. *National Labor Relations Board*, 278 F. 2d 482 (C.A. 6). See also *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199 (C.A. 4); *National Labor Relations Board* v. *Shop Rite Foods, Inc.*, 430 F. 2d 786 (C.A. 5).

The court below concluded that an exception to the foregoing principles exists for concerted activity

[11] The court, however, found that this interference was "limited," on grounds that the employees utilized the procedures provided for in the contract before resorting to self-help, and that they were working for the same ultimate goal as was the Union—namely, elimination of racial discrimination (Pet. App., pp. 24–26). But, as the Board noted, this cannot neutralize the fact that the employees, nonetheless, were "acting outside the agreement and contrary to the Union's advice and urging" (Pet. App., p. 103). Indeed, they even refused to give testimony which the Union considered vital to its case, and instead walked out of the Adjustment Board meetings (*supra*, p. 7). See also Pet. App., pp. 42–45, dissenting opinion.

involving racial discrimination since Title VII of the Civil Rights Act of 1964 gives the employee an independent statutory right to be free of racially discriminatory employment practices, and Section 704(a) of that Title precludes an employer from discharging employees for engaging in peaceful picketing to protest such practices. The Board submits that this reasoning does not withstand analysis.

While Title VII prohibits an employer from maintaining racially discriminatory employment conditions (Section 703(a), 42 U.S.C. 2000e–2(a)), it also provides a means whereby an employee can obtain redress for a violation of that Title—*i.e.*, he can file a charge with the Equal Employment Opportunity Commission, and, if the Commission is unable to eliminate the discrimination by voluntary means, he can then attempt to do so through a suit in the federal district court (Section 706(e), 42 U.S.C. 2000e–5(e)).[12] There is no indication in Title VII that Congress intended to go further and authorize an employee to enforce the rights conferred by Title VII by means which would be contrary to the policies of the National

[12] The 1972 amendments to the Civil Rights Act also empower the Commission to bring such a suit (Section 706(f)(1), added by P.L. 92–961, 86 Stat. 103).

Harrell Alexander Sr. v. *Gardner-Denver Co.*, No. 72–5847, argued November 5, 1973, presents the question whether an employee—who pursues both his contractual remedies by filing a grievance under the contract grievance and arbitration procedure, and his federal rights by filing a charge under Title VII—is precluded from maintaining a federal court suit where an unfavorable arbitration decision is entered after the Title VII charge was filed.

Labor Relations Act. On the contrary, during the Senate debate on Title VII, Senator Clark, one of the proponents of the legislation, introduced a statement prepared by the Department of Justice which emphasized that "[n]othing in title VII or anywhere else in this bill affects rights and obligations under the NLRA," and Senator Clark himself added that the Title "would not affect the present operation of any part of the NLRA." Legislative History of Titles VII and XI of Civil Rights Act of 1964 (U.S. Equal Employment Opportunity Commission) 3244–3245.

Nor is a different conclusion required by Section 704(a) of Title VII, 42 U.S.C. 2000e–3(a), which makes it unlawful for an employer "to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The basic purpose of this provision is "to protect [the individual] who utilizes the tools provided by Congress to protect his rights." *Pettway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998, 1005 (C.A. 5). The essential "tools provided by Congress" consist of filing a charge with the Equal Employment Opportunity Commission and, if that proves unavailing, bringing a court suit. While the protection of section 704(a) is not limited to the employee who has filed charges, unlike the National Labor Relations Act, Title VII contains no provision expressly protecting picketing and other concerted activity. Although the

court of appeals in *Green* v. *McDonnell Douglas Corp.*, 463 F. 2d 337 (C.A. 8), stated that "lawful protest also commands the same protection" as "filing complaints to the EEOC," it added that "we find no suggestion that [the] protection [of Section 704(a)] extends to activities which run afoul of the law" (*id.* at 341).[13] Accordingly, if the picketing and related activity in the present case were contrary to the policies of, and thus unprotected by, the National Labor Relations Act (such as picketing in support of a demand for direct bargaining with a splinter group), they would not be sanctioned by Section 704(a) of Title VII.[14]

Finally, contrary to the view of the dissenting judge (Pet. App., p. 42), the Board's position does not give the bargaining representative the "power to stand athwart a minority's claim to the right to seek racial non-discriminatory conditions." This Court has fashioned the duty of fair representation, which "'has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.'"

[13] The court then went on to hold that the "stall-in" demonstration there involved was not a protected activity under Section 704(a) (463 F. 2d at 341). Review of that issue was not sought in this Court. *McDonnell Douglass Corp.* v. *Green*, 411 U.S. 792, 797, n. 6. However, the Court stated: "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it" 411 U.S. at 803).

[14] The court below, in holding that the picketing here would not be privileged if the Board were to find that the Union was seeking to eliminate racial discrimination by "the most expedient and efficacious means," tacitly acknowledged that the scope of Section 704(a) may turn upon the scope of the protection afforded by Sections 9(a) and 7 of the National Labor Relations Act (Pet. App., p. 28, emphasis omitted).

National Labor Relations Board v. *Allis-Chalmers Mfg. Co., supra,* 388 U.S. at 181, quoting from *Vaca* v. *Sipes,* 386 U.S. 171, 182. Thus, if a union representative were not acting in good faith to adjust the complaint of a minority employee, the union would not only be subject to a court suit for breach of its duty of fair representation (see *Vaca* v. *Sipes, supra*), but it would also violate Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A). See *Local Union No. 12, United Rubber C., L. & P. Workers* v. *National Labor Relations Board,* 368 F. 2d 12 (C.A. 5), certiorari denied, 389 U.S. 837.[15]

2. The holding of the court below that a proper accommodation between Section 9(a) of the National Labor Relations Act and Title VII of the Civil Rights Act of 1964 requires that the union not only act in good faith to eliminate racial discrimination practiced by the employer,[16] but that it do so "to the fullest extent possible by the most expedient and efficacious means"

[15] This case does not raise, and the Board has not yet had occasion to pass on, the question whether, in circumstances where the union has failed to fulfill its obligations as a bargaining representative, the minority employees could bypass the union and engage in concerted activity of the kind here for the purpose of compelling the employer to deal directly with them respecting their complaints. See Pet. App., p. 55, n. 2. See, also, *National Labor Relations Board* v. *Tanner Motor Livery, Ltd.*, 419 F. 2d 216, 221 (C.A. 9). Cf. *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 256; *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (C.A. 8).

[16] Title VII also prohibits discrimination on grounds of sex, religion, and national origin (Section 703(a), 42 U.S.C. 2000e–2(a)). The rationale of the court's decision would appear to be applicable to claims of such discrimination as well.

(Pet. App., p. 28, emphasis omitted) would, in the Board's view, require it to apply a standard that would be virtually impossible to administer. The Board would have to decide whether union efforts, taken in a good-faith effort to eliminate racial discrimination, constituted the fullest possible endeavors for "actually remedying" the discrimination and whether there were more "expedient and efficacious means" for accomplishing that objective. Under this standard, the Board would be required, *inter alia,* to substitute its judgment for that of the union with respect to the proper methods for handling the grievances under the grievance and arbitration provisions of the collective bargaining agreement.

The decision how to process a grievance—how far to press a particular point, when to concede on a particular issue and what tactics to use in presenting the position—involves extremely sensitive and delicate considerations not susceptible to evaluation under the kind of standard by which the court of appeals has required the Board to test the union's endeavors. Cf. *Vaca v. Sipes,* 386 U.S. 171, 191–195. The standard the court of appeals adopted would substantially curtail the "wide range of reasonableness [which] must be allowed a statutory representative in serving the unit it represents" (*Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338). Inevitably, the very vagueness of this stand-

ard would encourage employees to resort to self-help to challenge a large number of union actions in handling, under the grievance and arbitration provisions of collective bargaining agreements, complaints of racial discrimination. This, in turn, would undermine the judgment of Congress, reflected in the National Labor Relations Act that, to the maximum extent possible, disputes relating to terms and conditions of employment should be adjusted by the means agreed to by the parties, rather than through economic pressure.

Unlike the holding of the court below, the Board's position gives effect to the policies of Title VII without at the same time nullifying those of Section 9(a). Thus, the Board's position requires a minority group complaining of a Title VII violation by the employer to refrain—at least so long as the union representative is making a good faith effort to cure the violation (see n. 15, *supra*)—from engaging in concerted activity to force the employer to bypass the representative. If the individual employees are dissatisfied with the steps the representative takes, they may seek a remedy through the administrative and judicial procedures provided in Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel.
JOHN S. IRVING,
Deputy General Counsel.
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Deputy Associate General Counsel,
ABIGAIL COOLEY,
Assistant General Counsel,
National Labor Relations Board.

NOVEMBER 1973.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

(No. 71-1656, September Term, 1972)

WESTERN ADDITION COMMUNITY ORGANIZATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

THE EMPORIUM CAPWELL COMPANY, *Intervenor.*

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: ROBINSON and MACKINNON, *Circuit Judges,* and WYZANSKI,* *Senior United States District Judge for the District of Massachusetts.*

JUDGMENT

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the decision and order of the National Labor Relations Board ap-

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

pealed from in this cause are hereby reversed and this case is hereby remanded to the Board in accordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court:

HUGH E. KLINE, *Clerk.*

Date: JUNE 29, 1973.

Opinion for the Court filed by Circuit Judge MACKINNON.

Dissenting opinion filed by Senior District Judge WYZANSKI.

U.S. GOVERNMENT PRINTING OFFICE: 1973